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The Honorable Ronald B. Leighton

Attorney for Columbia Collectors, Inc. dba CCI Billing Systems

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHELLE ECHLIN FKA MICHELLE
SIMKINS, on behalf of herself and all others
similarly situated,

Plaintiffs,

vs.

COLUMBIA COLLECTORS, INC. DBA CCI
BILLING SYSTEMS,

Defendant.

Case No.: 3:12-CV-05878-RBL

DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FED.R.CIV.P.12(B)(1)

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
January 11, 2013

Defendant, Columbia Collectors, Inc. ("CCI") moves this court for an order dismissing the above-entitled action pursuant to *FRCP 12 (b) (1)* because Plaintiff's First Amended Complaint (ECF No. 9) (FAC) is moot.

I. STATEMENT OF FACTS

On October 2, 2012, Plaintiff filed a Complaint alleging violations of the Fair Debt Collection Practices Act, *15 U.S.C. § 1692 et seq.* (FDCPA) (ECF No. 1). Plaintiff sought: actual damages, statutory damages of \$1,000 and reasonable attorneys' fees. (ECF No. 1).

DEFENDANT'S MOTION TO DISMISS PURSUANT
TO FED.R.CIV.P.12(B)(1) - 1
Case No. 3:12-CV-05878-RBL

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On November 21, 2012, Defendant Columbia Collectors, Inc. sent Plaintiff an Offer of Judgment (“the Offer”) pursuant to *FRCP* 68. See Certificate of Service with the Offer of Judgment. The Offer allowed judgment to be entered against Columbia Collectors, Inc. for \$1,500, plus costs, disbursements and reasonable attorney fees.

As of December 1, 2012, 10 days after service was provided, Defendant received no written notice that Plaintiff had accepted the Offer. See Declaration of Jeffrey I. Hasson. Therefore, pursuant to the terms of *FRCP* 68, the Offer was deemed denied and withdrawn. The offer of judgment expired while the Action was still alleged as an individual claim.

On December 12, 2012, Plaintiff filed the FAC, alleging the liability to Plaintiff as a class representative for the same individual FDCPA violation. (ECF No. 9, p. 9-11¹).

II. ARGUMENT AND AUTHORITY

A. LEGAL STANDARD TO DISMISS PURSUANT TO *FRCP* 12 (b)(1)

FRCP 12 (b) (1) requires that “[w]henver it appears by suggestion of the parties of otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” See *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). Subject matter jurisdiction cannot be waived, and a federal court is under a continuing duty to dismiss an action whenever it appears the court lacks jurisdiction. *FRCP* 12 (h) (3); see also *Snell v. Cleveland*, 316 F.3d 822, 826 (9th Cir.2002).

When a defendant moves to dismiss an action for lack of subject matter jurisdiction pursuant to *FRCP* 12 (b)(1), the plaintiff bears the burden of proof on the necessary jurisdictional facts because the plaintiff is the party invoking the court’s jurisdiction. *Rance v. D.R. Horton, Inc.*, 316 Fed. Appx. 860 (11th Cir. 2008).

Unlike a motion to dismiss brought under *FRCP* 12 (b) (6), a court is not confined to the

¹ Although *FRCP* 68 indicates that “Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs”, a number of courts have explained that a “district court can consider an offer of judgment to determine whether a claim is moot, in order to ascertain whether there is a justiciable case or controversy under Article III of the Constitution.” *O’Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 574 (6th Cir. Ohio 2009); *Hoppe v. Euclid Manor Nursing Home* 867 F.2d 291, 295 (6th Cir. 1989); *Greisz v. Household Bank (Ill.)*, N.A., 176 F.3d 1012, 1015 (7th Cir. 1999).

four corners of the complaint, it may consider other evidence properly before the court, and it need not assume the truthfulness of the complaint. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989). Furthermore, the existence of disputed material facts will not preclude a trial court from evaluating the merits of a challenge to subject matter jurisdiction. *Clausen Law Firm, PLLC v. Nat'l Acad. Of Continuing Legal Educ.*, 2010 WL 4651211 (W.D. Wash. Nov. 2, 2010).

Federal courts lack subject matter jurisdiction to consider moot claims. *Rosemere Neighborhood Ass'n v. U.S. Environmental Protection Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009). A case becomes moot when it no longer satisfies the case-or-controversy requirement of U.S. Const. art. III, § 2. *PUC v. FERC*, 100 f.3D 1451, 1458 (9TH Cir. 1996). Specifically, mootness occurs when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The latter situation is commonly referred to as the personal-stake requirement, and it assures that federal courts are presented with disputes they are capable of resolving because they can afford the prevailing party meaningful relief. *Id.*

B. A REJECTED RULE 68 OFFER THAT WOULD HAVE PROVIDED PLAINTIFF WITH A GREATER REWARD THAN THE AMOUNT BEING SOUGHT RESULTS IN MOOTING THE ACTION

The “plain purpose of Rule 68 is to encourage settlement and avoid litigation... The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.” *Marek v. Chesny*, 473 U.S. 1, 5, 105 S.Ct. 3012 (1985). A “Rule 68 offer... provid[ing] Plaintiff with all the relief requested and Plaintiff’s failure to accept [such an]... offer establishes that Plaintiff no longer has a cognizable interest in [the]... litigation.” *Clausen Law Firm, PLLC, supra*. *3.

Thus, “an offer of judgment providing plaintiff with the maximum allowable relief would moot plaintiff’s claim” if Plaintiff rejects it, thus resulting in dismissal pursuant to *FRCP 12 (b) (1)*. *Gator.com v. L.L. Bean, Inc.*, 398 f.3D 1125, 1131-32 (9TH Cir. 2005); *see also Greisz v. Household*

1 *Bank (III.) N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (an offer of judgment that encompasses the
 2 relief claimed “eliminates a legal dispute upon which federal jurisdiction can be based,” because
 3 “[y]ou cannot persist in suing after you’ve won.”); *Board of Governors of the Fed. Reserve System*
 4 *v. Shoaib*, 43 F.3d 1478 (9th Cir. 1994) (full offer of settlement renders case moot); *Lomas v.*
 5 *Emergency Med. Billing, L.L.C.*, 2008 WL 4056789 (D. Utah Aug. 25, 2008).

6 The Court in *Lomas v. Emergency Med. Billing LLC, supra*, determined that a rejected offer
 7 of “\$5,001.00 plus costs and attorneys’ fees” was sufficient to dismiss a plaintiff’s complaint for
 8 violations of the FDCPA. *Id.*

9 The Court wrote:

10 [d]amages under the FDCPA for a successful plaintiff are limited to actual
 11 damages, a maximum of \$1,000.00 in statutory damages, and costs and reasonable
 12 attorney’s fees... Plaintiff has set forth no pleading that establishes any actual
 13 damage. Accordingly, Plaintiff’s claims are limited to statutory damages, costs,
 14 and reasonable attorney’s fees. By offering Plaintiff \$5,001.00 plus costs and
 15 reasonable attorney’s fees, the Rule 68 Offer offered Plaintiff far in excess of what
 16 she can hope to recover at trial... Plaintiff no longer has a dispute over which to
 17 litigate.

18 *Id.* At *2.

19 In order to invoke *FRCP 12 (b) (1)* after an offer of judgment has been rejected, the
 20 defendant must show that the offer must “provide all the relief a court might reward.” *Shoaib*,
 21 *supra.* at *2. Such offer need not encompass relief to which the plaintiff is not entitled to lawfully
 22 receive. *See Martin v. PPI, Inc.*, 2010 WL 2572524 (N.D. Ill. June 25, 2010). In *Frasco v. Sec.*
 23 *Check, LLC*, 2009 WL 57102 (S.D. Miss. Jan. 7, 2009), the District Court found a plaintiff has
 24 presented “no proof establishing any economic damages.” Ultimately, the Court concluded that
 25 “that the offer of judgment constituted all the relief Plaintiff could hope to recover for Defendant’s
 26 alleged FDCPA violations.” *Id.*

27 **C. PLAINTIFF’S COMPLAINT IS MOOT AND SHOULD BE DISMISSED**
 28 **PURSUANT TO *FRCP 12 (b)(1)***

29 Here, Plaintiff has rejected the Offer, which is far in excess of the total amount she may
 30 recover at trial on an individual claim while the claim was an individual claim. The initial

1 complaint was not brought as a class claim. The offer was made while the matter was an individual
2 claim. The offer in the individual claim made the action moot. As a result, plaintiff cannot
3 represent a class since her claim is moot.

4 Neither plaintiff's initial complaint nor FAC define or establish any actual monetary
5 damages suffered. As such, her monetary recovery is limited to statutory damages of \$1,000 per
6 defendant, costs, and reasonable attorneys' fees. Therefore, the most that Plaintiff can recover at
7 trial is \$1,000, plus costs and reasonable attorneys' fees.

8 In the present case, the Offer to Plaintiff was \$1,500 plus costs and attorney's fees. These
9 results are significantly greater than any damages allowed under the FDCPA, greater than the
10 \$1,000 found in *Lomas* to be sufficient to dismiss a FDCPA action, and most importantly, greater
11 than the amount of money that Plaintiff could hope to recover at trial in the FDCPA claim prayer.
12 Plaintiff's rejection of the Offer should result in dismissal of her lawsuit as moot, pursuant to *FRCP*
13 *12 (b) (1)*.

14 III. CONCLUSION

15 It is well-established that if a plaintiff rejects an offer of judgment that is greater than the
16 total amount recoverable at trial, said plaintiff can no longer establish a legitimate personal stake in
17 the case, and the pending action is to be dismissed as moot.

18 In this case, plaintiff has not shown the existence of actual monetary damages. Therefore,
19 her recovery is limited, by statute, to an amount of not more than \$1,000, plus costs and attorney's
20 fees – which is far below the rejected Offer with a total value of \$1,500 plus costs and attorney's
21 fees. She simply could not receive a monetary award greater than the rejected Offer based on her
22 claims.

1 Thus, Plaintiff's Complaint is rendered moot, and should be dismissed pursuant to *FRCP 12*
2 *(b) (1)* as outside the Court's jurisdiction.

3 Dated December 19, 2012.

4 s/ Jeffrey I. Hasson

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8 *Attorney for Columbia Collectors, Inc. dba CCI*
9 *Billing Systems*

Certificate of Service

I hereby certify that on December 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Jon N. Robbins and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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